Supreme Court, U.S.
FILED
MAR 27 1992
OFFICE OF THE CLERK

(2)

# No. 91-1458

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

EVA WHEELER,
*Petitioner,*

VS.

BUILDING GRIEVANCE COMMITTEE
OF THE CITY OF O'FALLON, ILLINOIS,
IRVING SVENDSON, RICH GOZARD, DICK RICHARDSON,
CECIL O. LOYET, VICTOR LOGAN and CAROL LOGAN,
*Respondents.*

## BRIEF IN OPPOSITION

ROBERT J. SPRAGUE
15 South High Street
Belleville, IL 62220
(618) 233-5190

*Attorney for the Respondents,*
*Victor Logan and Carol Logan*

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

## TABLE OF CONTENTS


| | Page |
|---|---|
| Argument | 1 |
| Conclusion | 5 |
| Appendix: | |
| Appendix A | A-1 |
| Appendix B | A-5 |
| Appendix C | A-7 |
| Appendix D | A-14 |

## TABLE OF AUTHORITIES

Page(s)

**Cases:**

Illinois Indpendent Telephone Assoc. v. Illinois Commerce Commission, 183 Ill.App.3d 220, 539 N.E.2d 717 (4th Dist. 1989) ..... 4

Sagittarius v. Village of Arlington Heights, 90 Ill.App.3d 401, 413 N.E.2d 90 (1st Dist. 1980) ..... 4

# No. 91-1458

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

EVA WHEELER,

*Petitioner,*

VS.

BUILDING GRIEVANCE COMMITTEE
OF THE CITY OF O'FALLON, ILLINOIS,
IRVING SVENDSON, RICH GOZARD, DICK RICHARDSON,
CECIL O. LOYET, VICTOR LOGAN and CAROL LOGAN,

*Respondents.*

---

## BRIEF IN OPPOSITION

---

### ARGUMENT

### I.

### THE APPELLATE COURT PROPERLY DISMISSED THE APPEAL.

The Defendants-Appellees, Victor and Carol Logan, adopt the June 14, 1991 Order of the Appellate Court of the Fifth District in this case as their argument for this point.

## II.

## THE TRIAL COURT PROPERLY GRANTED THE MOTION TO DISMISS.

This case has previously been in the Appellate Court on the same point that is raised in this appeal. (Ex. "A" in appendix). However, O'Fallon changed its ordinances that apply to this case shortly after the Appellate Court decision. In the first case the Appellate Court ruled that the building ordinance with a six-foot set back applied over the zoning ordinance's four-foot set back because the ordinances conflicted and the Building Ordinance was passed last. This Court held that where there is an irreconcilable conflict between ordinances the latest enactment in point of time will usually control. Section 428.4 of the BOCA Building Code adopted January 7, 1980, provides that the wall of a swimming pool shall not be closer than six feet to a side lot line. The Zoning Ordinance Section 2.04(e) provided for a three foot setoff for the swimming pool (Ex. "B" in Appendix). This Court held the six feet setoff controlled.

Plaintiff's First Amended Complaint, directed against Victor and Carol Logan, in Count II seeks a permanent injunction against the Logans to relocate their swimming pool in compliance with Section 428.4 of the Building Code of the City of O'Fallon as enacted by ordinance on January 7, 1980. If Plaintiff was successful in her law suit, Defendants would have to move their swimming pool. However, the City of O'Fallon passed Ordinance 1116 on September 4, 1984 (Ex. "C" in Appendix). Ordinance 1116 adopted the "CABO ONE AND TWO FAMILY DWELLING CODE". The Cabo Code provides in R-103.1 Scope:

> "The provisions of this Code apply to the construction, prefabrication, alteration, use, occupancy, and maintenance of detached one and two family dwellings not more than three (3) stories in height and their accessory structures.

> Compliance with the requirements of this Code as amended, may be construed as prima facie evidence of compliance with the locally adopted Code."

The CABO Code is the Building Code that applies to single family residences in the City of O'Fallon and it is silent as to the setoff distance for a swimming pool. Ordinance 1116 also provides:

> "The provisions of this Code shall not be construed to repel, modify, or constitute an alternative to the provisions of the Zoning Ordinance as they relate to permitted classes of principal structures, and/or to the area and bulk regulations for buildings and structures." Section 2.04(e) is the "area and bulk regulations" provision of the O'Fallon Zoning Ordinance. Therefore, it is clear the CABO ONE AND TWO FAMILY DWELLING CODE does not control the distance from a side lot line for a swimming pool, but that the Zoning Ordinance Section 2.04(e) does.

On February 18, 1985, the City of O'Fallon adopted the BOCA Basis Natural Building code/1984 as amended by passing Ordinance 1138 (Ex. "D" in Appendix). There is a significant difference between the adoption of this building code and the one that was in force at the time of the first appeal. Section 101-5-1(c) Exemptions reads;

> "Zoning - the provisions of this code shall not be construed to repeal, modify, or constitute an alternative to the provisions of the Zoning Ordinance as they relate to permitted classes of principal buildings, to use and occupancy of building and structures, and/or to the area and bulk regulations of the building and structures."

Through the passage of Ordinance 1138, the O'Fallon City Council eliminated any conflict it had with the Zoning Ordinance in relation to "area and bulk regulations of the building and

structures". Section 2.04(e) of the Zoning Ordinance which sets the three foot side lot distance is an area and bulk regulation of the Zoning Ordinance. Therefore, the BOCA Building Code is no longer in conflict with the Zoning Ordinance and, by the express language of Ordinance 1138, the Zoning Ordinance controls. The O'Fallon City Council, by passing Ordinance 1138, eliminated the conflict that existed when the case was first in the Appellate Court and the Zoning Ordinance now controls.

It is our contention that the CABO ONE AND TWO FAMILY DWELLING CODE applies, but if the Court would decide it didn't and the BOCA Code applies, the Zoning Ordinance still controls the required setback for a lot line for a swimming pool because of the language added to Ordinance 1138 which eliminated the conflict between the Zoning Ordinance and the BOCA Code and the CABO Code.

## III.

## A COURT OF REVIEW MUST DECIDE PENDING CASES BASED ON LAW IN EFFECT AT THE TIME OF DECISION.

The law is clear in Illinois that a Court must decide pending cases based on the law in effect at the time of the decision. *Illinois Independent Telephone Assoc. v. Illinois Commerce Commission*, 183 Ill.App.3d 220, 539 N.E.2d 717 (4th Dist. 1989); *Sagittarius v. Village of Arlington Heights*, 90 Ill.App.3d 401, 413 N.E.2d 90 (1st Dist. 1980). As shown in the previous Argument, the City of O'Fallon changed its ordinances prior to the Plaintiffs filing their amended complaint and, therefore, the trial court was proper in following the new ordinances to grant the Motion to Dismiss. Plaintiff cites the Sagittarius case for the proposition that she has a vested right and the new law shouldn't apply. A following through of this reasoning shows she has no vested right. The Defendants built the swimming pool believing

the three feet distance from a side lot line as set forth in the Zoning Ordinance applied. Plaintiffs filed suit to contest this. This Court in the first appeal decided the six feet distance to a side lot line in the BOCA Code applied. The City of O'Fallon by Ordinances 1116 and 1138 amended their ordinances so that the Zoning Ordinances applied in this case. Plaintiff has done nothing, but file law suits. She has done nothing else, so the only thing she could have a vested right in is her law suits and the law is clear that this court has to decide the case on the law as it exists now. If the Court follows the old law, as it existed at the time of the first appeal, a ridiculous result is reached. This Court would rule that the old law applies and Defendants must move their swimming pool because it is within six feet of the side lot line in violation of the BOCA Code. The Defendants would move their swimming pool and then go to the City of O'Fallon to get a permit to put it back. The City, under its new ordinances, would tell the Defendants that they could now put it back exactly where it had been because the Zoning Ordinance now controls and it can be within three feet of a side lot line.

## CONCLUSION

WHEREFORE, Victor and Carol Logan, the Defendants-Appellees pray the Court to deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

/s/ Robert J. Sprague
Attorney for the
Defendants-Appellees.

ROBERT J. SPRAGUE #2693690
SPRAGUE & SPRAGUE
15 South High Street
Belleville, Illinois 62220
(618) 233-5190